

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 1969 of 1984

For Approval and Signature:

Hon'ble MR.JUSTICE S.K.KESHOTE

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

H. B. DESAI

Versus

STATE OF GUJARAT & ORS.

Appearance:

MR AK CLERK for Petitioner

MR NIGAM SHUKLA for Respondents

CORAM : MR.JUSTICE S.K.KESHOTE

Date of decision: 19/08/96

ORAL JUDGMENT

Heard learned counsel for the parties. The petitioner, a sub-regional employment officer in the Employment Exchange department filed this writ petition before this Court challenging thereunder the action of the respondents to deny him promotion to the post of Assistant Director of Employment.

2. Promotion has been denied to the petitioner only

on the ground that there were adverse remarks in his Confidential and Character Role Report of the year 1981-82. The petitioner was communicated these adverse remarks in his Confidential and Character Role Report of the year 1981-82, under the memo dated 16.3.83. The petitioner filed a representation against those remarks and that representation has also been rejected by the respondent under the order annexure 'C' dated 20.7.83. The petitioner has challenged in this Special Civil Application, the annexure 'A', communication of adverse remarks and annexure 'C', rejection of representation filed by him against those remarks. No other adversity has been pointed out in the reply in the service record of the petitioner. The petitioner has challenged the adverse remarks given to him in his Confidential and Character Role Report of the year 1981-82 on the grounds that, (i) the reporting officer Shri G.C. Bhutwala was a biased person; (ii) the petitioner filed a petition earlier before this Court being Special Civil Application No.1878 of 1979 in connection with his seniority in the cadre of Employment Officer and Shri G.C. Bhutwala was one of the respondents therein, (iii) the petitioner has claimed seniority above that person; (iv) as this person was biased against the petitioner, he would have reported adversely about his work, which is not impartial assessment; (v) Shri Bhutwala was given additional charge of the post of Assistant Director of Employment in his own pay scale. By virtue of that additional charge, he operated the post of Assistant Director of Employment and he became reporting officer of the petitioner but in sum and substance, he was the officer of same rank. Shri Bhutwala was working on the post of Assistant Director of Employment in addition to his own duties which was lower and as such, it was not a case where Shri Bhutwala was posted as Assistant Director of Employment after promotion; (vi) the adverse remarks have been communicated to the petitioner after about one year of end of financial year 1981-82. This delay in communication is fatal to the remarks. The petitioner made further grievance that the Government Circular dated 23rd August 1974 has not been followed before reporting adversely of his work by the Reporting Officer. The petitioner was never given any guidance or assistance before reporting his work adversely by the Reporting Officer. Otherwise also, the adverse remarks which have been given to the petitioner cannot be said to be adverse when the overall assessment of work of the petitioner has been stated to be 'fair'. These two remarks cannot be allowed to make his work to be adverse to the extent to deny him promotion on the next higher post.

3. Shri Bhutwala was impleaded as a party in person as there were allegations of malafides against him, but he has not chosen to file any reply to this Special Civil Application. In the reply to writ petition, it is not the case of the respondents that Shri Bhutwala was promoted to the post of Assistant Director, Employment. The respondents have come up with the case that the petitioner was junior to Shri Bhutwala who was appointed as Assistant Director invoking Rule 53 of G.F.R.S. The respondents have not denied that Shri Bhutwala was working in his own pay scale on the post, but discharging additional duties of Assistant Director, Employment.

4. A Reporting Officer should be superior officer who is above the cadre of the officer whose confidential reports are to be written. Technically, the Reporting Officer, Shri Bhutwala, had admittedly written the Confidential and Character Role Report of the petitioner, as a superior officer, who, if we see substance of the facts, was not promoted on the higher post, but was working on the higher post in addition to his own lower post and getting pay of lower post. In such cases, such officer may not be allowed as far as possible, to write the Confidential & Character Role Report of an officer of his own rank. Moreover, the petitioner was claiming seniority above Shri Bhutwala and he has filed Special Civil Application before this Court for getting said claim. Leaving apart the question of seniority, in the lower cadre, the petitioner and Shri Bhutwala have to compete with each other in the matter of promotion and the senior could also have been superseded in case his record is comparatively not better than the junior. In these facts, the grievance of the petitioner that the adverse remarks given to him by Shri Bhutwala was a deliberate attempt to spoil his service record so that he may not get promotion, cannot be said without any basis. Though only on this ground alone, the adverse remarks given to the petitioner by Shri Bhutwala in his Confidential and Character Role Report of the year 1981-82 deserves to be quashed and set aside, but I consider it proper to go on other questions also for the reason that the petitioner has not raised this point in the representation filed by him against those adverse remarks.

5. In the Circular dated 23.8.74, annexure 'L' to this Special Civil Application at page 53-53, attention has been invited of the concerned officers to instruction No.14(i) of instructions regarding writing and maintenance of Annual confidential reports issued under Government Resolution, General Administration Department

No.1169-K, dated 8th March, 1969, which lays down that best results can be achieved if every Reporting Officer realises that it is his duty not only to make an objective assessment of his subordinate's work and qualities but also to give him at all times the necessary advice, guidance and assistance to correct his faults and deficiencies. The Circular further states that in this part if the Reporting Officer's duty is properly performed, there should be no difficulty about recording adverse views because they would refer to defects in respect of which the Reporting Officer has made efforts to have them corrected. This Circular also enjoins upon the Reporting Officer that while mentioning any faults or defects of his subordinate he should also give indication of the efforts he made by way of guidance, admonition etc. to get the defects removed. In this Special Civil Application, the petitioner has made a specific averment on oath that this Circular has not been followed. The respondent concerned has never pointed out the defect in his work and qualities nor he has given any opportunity either oral or in writing on this point. The Reporting Officer has never given him necessary advice, guidance and assistance to correct his faults and deficiencies in work. These averments made by the petitioner have not been controverted. In the memo of communication of adverse remarks, it has also not been mentioned that the petitioner was ever informed of his faults and deficiencies in his working in writing by the Reporting Officer and that the Reporting Officer has given him, at all times, necessary advice, guidance and assistance to correct the same. In the reply, the respondents have come up with the case that the Circular dated 23rd August 1974, consist of guidelines for the Reporting Officer and even if such efforts as provided therein are not made by the Reporting Officer, there is no objection in writing adverse remarks in the Confidential and Character Role Report of the petitioner. This reply of the respondents is shocking. The Government issue Circulars to be followed by concerned officers and not to flout the same. Reply has been given by the State in this Special Civil Application and it has given defence contrary to its own Circular. In the present case, the Circular has not been followed by the Reporting Officer, the respondent No.4 herein and the respondent-State should have taken disciplinary action against him rather than to justify violation of said Circular by him. Whatever Circular is issued by the Government, has to be complied with and followed by the subordinate officer. It is a different matter that the Circular which is administrative in nature may not give enforceable right to the petitioner, but nevertheless, the respondent-State should not allow

free hand or liberty or freedom to the subordinate officers for whom the Circular meant to flout the same. In case the subordinate officer flouted the Circular of the Government, and acted contrary to the mandate contained therein, it is a case of insubordination or deliberate case of disobedience of the order of the Government, which can be said to be gross misconduct. The respondent No.4 was the person who may be biased against the petitioner on the basis of facts given out in the present writ petition which have not been controverted by that person. Care should have been taken by the State that such officer should have acted strictly in compliance of the said Circular. This reply has been filed by the respondent-State on 13th August 1996. What I feel is that the respondent-State, in all the petition filed the reply only with a clear object to oppose the petition. The State is a welfare State and it has to consider the grievances made by the petitioner in this writ petition objectively and not with an intention to contest the petition even if the claim is just and reasonable and deserves acceptance. How casually the grievances of the petitioner have been taken is clearly borne out from the reply filed by the respondent-State. In case the concerned officer who filed the reply would have taken care to go through the contents of the writ petition, then instead of contesting this claim, he would have advised the Government to take necessary disciplinary action against the respondent No.4 who has not complied with the Circular dated 23rd August 1974. This attitude of the State in the present case cannot be appreciated. If the Government itself permits its subordinate officers to flout its Circulars then how discipline can be enforced and maintained in service is the question not for this Court to decide, but for the Government to consider. The Supreme Court, in the case of State Bank of India v. Kashinath Kher & Ors. etc. reported in JT 1996(2) SC 578, at para-15 held that:

"... Confidential and character reports should, therefore, be written by superior officers higher above the cadres. The officer should show objectively, impartially and fair assessment without any prejudices whatsoever with highest sense of responsibility alone to inculcate devotion to duty, honesty and integrity to improve excellence of the individual officer. Lest the officers get demoralised which would be deleterious to the efficacy and efficiency of public service..."

The Supreme Court, in the case of Sukhdeo v. The

Commissioner, Amravati Division & Anr., reported in JT 1996 (5) SC 477, in para-6, held that:

"...When an officer makes the remarks, he must eschew of making vague remarks causing jeopardy to service of subordinate officer. He must bestow careful attention to collect all correct and truthful information and give necessary particulars when he seeks to make adverse remarks against the subordinate officer whose career prospect and service were in jeopardy....It would be salutary that the Controlling Officer before writing adverse remarks would give prior sufficient opportunity in writing by informing him of the deficiency he noticed for him. In spite of opportunity given if the officer/employee does not improve, then it would be obvious fact and would form material basis in support of adverse remarks. It should also be mentioned that he had given prior opportunity in writing for improvement and yet was not availed of so that it would form part of the record..."

The Government has issued Resolution wherein it has provided as the Supreme Court held in the aforesaid case. That has been provided way back in the year 1974, but the respondent No.4, the controlling officer of the petitioner has acted totally contrary to what the Circular provided and what the Supreme Court held. The power exercised by respondent No.4 as a Controlling Officer of the petitioner of recording adverse remarks in his Confidential and Character Role Report of the year 1981-82 is per-se illegal. The remarks which have been given to the petitioner by the Controlling Officer which are per-se illegal, cannot be allowed to stand. When the power exercised by the Controlling Officer is per-se illegal, then the order which has been made by the State on representation of the petitioner against those adverse remarks also goes. When the basic order itself is bad, then the order confirmed by rejecting the representation against the same also cannot be allowed to stand. It also falls down automatically as the power exercised by the Controlling Officer is per-se illegal.

6. As this petition deserves to be accepted only on this ground, I do not consider it appropriate to consider other grounds raised by learned counsel for the petitioner in this Special Civil Application.

7. In the result, this Special Civil Application succeeds and the adverse remarks given to the petitioner

under the communication annexure 'A' dated 16.3.82, are expunged. The annexure 'C', letter dated 20.7.83, rejecting the representation of the petitioner against the adverse remarks is also quashed and set aside. It is a case where the petitioner has been constrained to approach this Court. The respondent No.4 has acted in total disregard of the Government Circular and the Government has also acted mechanically in rejecting the representation filed by the petitioner against the adverse remarks and has taken defence in the reply which cannot be said to be befitting to the welfare State and it has not taken any action against respondent No.4 for acting contrary to the Circular of the Government, and as such, I consider it to be a fit case where exemplary costs have to be awarded. The respondent No.1 is directed to pay Rs.5,000/- by way of costs of this petition. Out of this amount of cost, Rs.1,500/- be deposited by the respondent No.1 in the office of the Gujarat State Legal Advisory Board, Ahmedabad, and Rs.1,500/- in the office of the Bar Council of Gujarat, under the head of Advocates Welfare Fund and the remaining amount of Rs.2,000/- to be paid to the petitioner. The amount of Rs.5,000/- shall be recovered by respondent No.1 from respondent No.4 who made remarks against the petitioner. The petitioner shall be entitled for all consequential benefits following therefrom after excluding the adverse remarks for the year 1981-82. The case of the petitioner's promotion may be considered afresh after excluding those adverse remarks from consideration and in case he is found suitable for the same, he may be given all consequential benefits. This exercise should be undertaken by the respondent No.1 within a period of three months from the date of receipt of certified copy of this order and all other consequential benefits for which he is found entitled may be given to the petitioner within next three months. Rule is made absolute in aforesaid terms.

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(sunil)